STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD RANDOLPH RHODEN,

Defendant-Appellant.

UNPUBLISHED
July 25, 2006

No. 262102
Wayne Circuit Court
LC No. 04-009515-01

Before: Fitzgerald, P.J., and Saad and Cooper, JJ.

COOPER, J. (*dissenting*).

Defendant appeals as of right his jury trial convictions and sentences for three counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a), and one count of fourth-degree criminal sexual conduct, MCL 750.520e(1)(a).

I must respectfully dissent from my colleagues because I believe the trial court did abuse its discretion in admitting other acts evidence involving a prior sexual assault. The trial court admitted the evidence under the common plan or scheme exception to MRE 404(b). I do not believe that the elements identified as linking the two incidents are sufficient to establish the proper purpose of common plan or scheme, and that the evidence therefore had no purpose but to establish defendant's clearly bad character.

The trial court relied on two factors in finding a common plan or scheme: that the assaults happened in defendant's home, and that defendant was drinking alcohol when each occurred. I would find that these factors are too pedestrian to qualify as elements of a common plan or scheme. In *People v Hine*, 467 Mich 242, 252-253; 650 NW2d 659 (2002), while our Supreme Court noted that ". . . distinctive and unusual features are not required to establish the existence of a common design or plan," it also found a common plan existed specifically because "[t]he charged and uncharged acts contained common features beyond similarity as mere assaults." The facts here simply do not support the same conclusion.

In this case the victim was the 15 year-old daughter of defendant's landlord. The victim and her father lived on the lower floor of a duplex and the defendant lived on the upper floor. Although the victim only spent summers with her father, she apparently spent a significant amount of time either with defendant or at least in his residence, as trial testimony indicates she was free to use defendant's computer and internet access for email purposes, and his cell phone

to make long-distance calls. Defendant invited the victim to his apartment to watch a movie, around 1:00 a.m.. She agreed, and during this visit the charged sexual assaults occurred.

The other acts evidence admitted involved an assault eight days prior. In that incident, the victim was an adult co-worker of the defendant. She and her boyfriend were in defendant's apartment for the purpose of fixing a faucet in his bathroom. At one point, when the boyfriend left the apartment briefly to get more tools from his truck, defendant tried to force himself on the victim and touched her against her will. When the boyfriend returned to the bathroom, the victim moved into the living room, and defendant followed her and attempted to touch her again.

While this is in fact predatory behavior, as an unfortunate social commentary, such behavior is not unusual or unique, but it is distinctive from the actions of an adult male who preys upon the vulnerability of a minor. I fail to see similarities that link these two incidents beyond the fact that they are both assaults. The other acts evidence therefore fails to establish a common scheme or plan, and should not have been admitted on MRE 404(b) grounds. And there is a 403 problem as well.

In this case, since the younger victim admitted that she did not say no to defendant when he started having sex with her the first time, admitted she smoked a cigarette with him and cuddled with him after the assault, admitted she did not leave defendant's apartment either during the time that he left between the first and second assaults, or after defendant had fallen asleep, it becomes a credibility contest. In a close case, any testimony about any other assault, no matter how dissimilar, would have a negative effect on jurors. This is the very definition of a circumstance where unfair prejudice will substantially outweigh probative value. MRE 403. And it is the reason why character evidence is excluded unless subject to narrowly drawn exceptions:

> The problem with character evidence generally and prior bad acts evidence in particular is not that it is irrelevant, but, to the contrary, that using bad acts evidence can "'weigh too much with the jury and . . . so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.'"
> [*People v Crawford*, 458 Mich 376, 384; 582 NW2d 785 (1998), quoting *Old Chief v United States*, 519 US 172, 181; 117 S Ct 644 (1997), and *Michelson v United States*, 335 US 469, 476; 69 S Ct 213 (1948)]

Because I would find that admitting this character evidence violates both MRE 404(b) and MRE 403, I would reverse.

/s/ Jessica R. Cooper